

No. 11661.

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

HOME INDEMNITY COMPANY OF NEW YORK, a corporation,

*Appellant.*

*vs.*

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,  
a corporation, *et al.*,

*Appellees.*

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APPELLANT'S BRIEF.

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## TOPICAL INDEX

	PAGE
Jurisdiction .....	1
Statement of the case.....	3
Specifications of error.....	11
Summary of argument.....	12
Argument .....	13
Point I. This court on appeal may review the sufficiency of the evidence to sustain the findings.....	13
Point II. Certain of the findings of fact of the Honorable District Court necessary to sustain the judgment are against the clear weight of the evidence (Specifications of Error I, II and III).....	16
Point III. In view of the reservation of rights the court erred in finding and deciding that it was the duty of the Home to establish the truth of White's statement, and that it was estopped to assert a breach of the co-operation clause (Specification of Error IV).....	20
Point IV. Prejudice must be presumed as a matter of law from the breach of the co-operation clause of the Home policy under the weight of authority both in the United States and the California state courts.....	22
Conclusion .....	27

## TABLE OF AUTHORITIES CITED

CASES	PAGE
Bowen v. Cote, 69 F. (2d) 136.....	21
Buffalo v. United States Fidelity & Guaranty Co., 84 F. (2d) 883.....	25
Doolan v. U. S. F. & G. Co., 85 N. H. 531, 161 Atl. 39.....	21
Eakle v. Hayes, 185 Wash. 520, 55 P. (2d) 1072.....	21
Hynding v. Home Accident Insurance Company, 214 Cal. 743....	23
Jensen v. Eureka Casualty Co., 10 Cal. App. (2d) 706.....	22
Langsley v. Obert, 129 Cal. App. 214.....	17
MacGowan v. Barber, 127 F. (2d) 458.....	13
Margellini v. Pacific Auto. Insurance Co., 33 Cal. App. (2d) 93..	24
Miller v. Union Indemnity Co., 209 App. Div. 455, 204 N. Y. Supp. 730 .....	25
Norton v. Central Surety & Ins. Co., 9 Cal. App. (2d) 598.....	22
Panhans v. Associated Indemnity Corp., 8 Cal. App. (2d) 532....	22
Purefoy v. Pacific Auto. Indem. Exch., 5 Cal. (2d) 81.....	23
State Farm Mut. Automobile Ins. Co. v. Bonacci, 111 F. (2d) 412 .....	13
State Farm Mutual Auto. Ins. Co. v. Phillips, 210 Ind. 161, 2 N. E. (2d) 989.....	21
United States Fidelity & Guaranty Co. v. Wyer, 60 F. (2d) 856..	21
Valladao v. Fireman's Fund Indemnity Co., 13 Cal. (2d) 322....	22, 23, 24
Wormington v. Associated Indemnity Co., 13 Cal. App. (2d) 321	22
Wright v. Farmers Auto. Inter-Insurance Exchange, 39 Cal. App. (2d) 70.....	24
STATUTES	
Business and Professions Code, Sec. 6068, Subsec. (c).....	21
Judicial Code, Sec. 24 (28 U. S. C. A., Sec. 41).....	2
Judicial Code, Sec. 128 (28 U. S. C. A., Sec. 225).....	2
Judicial Code, Sec. 274d (28 U. S. C. A., Sec. 400).....	1
Rules of the United States Circuit Court of Appeals, Ninth Cir- cuit, Rule 20, Subsec. 2b.....	1
Vehicle Code, Sec. 480 .....	8, 16, 17, 27

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**APPELLANT'S BRIEF.**

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**Jurisdiction.**

In compliance with Rule 20 (C. C. A. 9, Subsection 2b) appellant states that the statutory provisions believed to sustain the jurisdiction of the District Court to render judgment and of this Court upon appeal to review the judgment are as follows:

*United States Code Annotated, Title 28, Section 400 (Judicial Code 274d): DECLARATORY JUDGMENTS AUTHORIZED:*

*Procedure:* (1) "In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any in-

terested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

*United States Code Annotated, Title 28, Section 41 (Judicial Code, Sec. 24, Amended): ORIGINAL JURISDICTION.*

The district courts shall have original jurisdiction as follows:

1. UNITED STATES AS PLAINTIFF: CIVIL SUITS AT COMMON LAW OR IN EQUITY. *First.* "\* \* \* or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States \* \* \*."

*United States Code Annotated, Title 28, Section 225 (Judicial Code, Sec. 128): APPELLATE JURISDICTION.*

(a) *Review of final decisions.* "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—*First:* In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

It appears from the plaintiff's complaint [R. pp. 2 and 3] that there is a diversity of citizenship between plaintiff and all of the defendants and that the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs of suit, and the District Court so found in its Findings of Fact [R. p. 174].

### Statement of the Case.

The defendant Home Indemnity Company of New York, a corporation, hereinafter referred to as the "Home", on November 30, 1945, issued its combination automobile policy insuring Walter Haggerty and Northumberland Mining Company, jointly and severally, as their respective interests may appear, against bodily injury liability in the amount of \$100,000.00 for each person, \$300,000.00 each accident, and property damage liability in the amount of \$5,000.00 each accident resulting from the operation of his 1942 Lincoln Zephyr four-door sedan, subject to the limits of liability, exclusions, conditions and other terms of the policy.

Paragraph III of the policy defining the word "Insured" provided in part as follows [R. p. 26, *et seq.*]:

"The unqualified word 'insured' wherever used in coverages A and B and in other parts of this policy, when applicable to such coverages, includes the named insured and, except where specifically stated to the contrary, also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured."

Paragraph XVII of the conditions upon which as a condition precedent the insurance attached, provided [R. p. 28]:

#### ASSISTANCE AND COOPERATION OF THE INSURED.

"The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of wit-

nesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident."

Paragraph I of the conditions provided, with reference to notice of accident [R. p. 27] :

"When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses."

Paragraph VI of the conditions specifically provided [R. p. 27] :

#### ACTION AGAINST COMPANY

"No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company. \* \* \*

Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder."

Plaintiff and respondent Standard Accident Insurance Company, hereinafter referred to as "Standard", by its automobile liability policy, effective from September 29, 1945, to September 29, 1946, insured George White against bodily injury liability in the amount of \$25,000.00, \$50,000.00 each accident, from the operation of a 1942 Packard automobile.

Paragraph VIII of said policy providing [R. p. 18]:

TEMPORARY USE OF SUBSTITUTE AUTOMOBILE

"While an automobile owned in full or in part by the named assured is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded by this policy with respect to such automobile applies with respect to another automobile not so owned while temporarily used as the substitute for such automobile. This insuring agreement does not cover as an insured the owner of the substitute automobile or any employee of such owner."

Paragraph XIII of the Standard's policy provided [R. p. 19]:

OTHER INSURANCE—COVERAGE A.

"If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under Insuring Agreements VII and VIII shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy ap-

plicable with respect to the automobile or otherwise, against a loss covered under either or both of said insuring agreements."

On July 20, 1946, George White, while driving the Lincoln Zephyr automobile described in the policy of the defendant Home, with the consent of the Northumberland Mining Co., at about 10:00 o'clock P. M., while proceeding from Los Angeles to San Diego, struck two pedestrians, killing one instantly and inflicting injuries on the other from which she subsequently died within a few hours. George White fled from the scene of the accident without stopping to render any assistance to the victims, making his identity known, or making any effort to secure the names of the witnesses to the accident, and when later apprehended by police officers disclaimed any knowledge of having been involved in any accident, and stated that the Lincoln Zephyr automobile had been damaged at the Santa Anita Race Track that afternoon [R. p. 272].

Upon receipt by the Home of notice of the happening of the accident, L. E. Clifton, Claims Adjuster of the Home Indemnity Company, and Thomas P. Menzies, its attorney, proceeded to San Diego and interviewed George White, who stated that he had not been involved in an accident; that he knew nothing of the occurrence of an accident at or near Solano Beach, and that the Lincoln Zephyr automobile had not struck anyone, and that with reference to the damage to the car that he had not been involved in any accident, and that the car had sustained damage to its left front headlight at the Hollywood Park Race Track at Inglewood, California, on the day of the accident [R. p. 382]; that the car was parked in a different place at the race track from where it had been left by

him, and that he saw the damage to the left front fender and headlight, and that at the time he saw it at the Hollywood Park Race Track in Inglewood, California, the headlight was bashed in.

On July 23rd, 1946, at San Diego, George White made a sworn statement, which was transcribed by R. B. Whitcomb, Notary Public and Shorthand Reporter [R. p. 58], in which he again categorically denied that he had been involved in any traffic accident between the time that he left the Beverly Wilshire about 6:30 or 6:45 P. M. until he stopped at the Drive-in stand between 8:30 and 9:00 P. M. in San Clemente [R. p. 65], and specifically denied that he had been involved in any accident or that he had hit any pedestrian or collided with any automobile or any object [R. p. 67].

Two actions were subsequently commenced in the Superior Court of San Diego County to recover damages for the alleged wrongful death of the two pedestrians killed in the accident [R. pp. 144 and 151].

The Home through its attorney, Thomas P. Menzies, took a non-waiver agreement from the defendant George White [R. p. 94] and entered its appearance in said actions, seeking a change of venue to Los Angeles County in respect to one of said actions. Upon this being denied Thomas P. Menzies prepared answers based upon the sworn statement of George White of July 23rd, 1946, which answers said White refused to verify on the ground that they denied the occurrence of the accident and stated that he believed he must have fallen asleep and that the accident could have occurred while he was asleep.

Subsequently, answers were prepared by Attorney John Holt, who represented White in the criminal proceedings

instituted against him as a result of the accident, in substance the same as the answers prepared by Mr. Menzies, except that they admitted the occurrence of the accident, and that the pedestrians were struck. These answers were filed by Mr. Menzies who immediately thereafter withdrew as attorney for Mr. White, and Home disclaimed further obligation under its policy either to defend the two Superior Court actions or to indemnify White on the ground that he had failed to bring himself within the coverage of the policy [R. p. 169].

Respondent Standard thereupon brought an action for declaratory relief wherein it sought to have the respective rights and liabilities under the two policies of insurance declared by the court.

The Home by its answer pleaded a copy of its policy of insurance [R. p. 25] and alleged for a separate and special defense, that in violation of the conditions in said policy defendant George White had failed, neglected and refused to cooperate with the Home in the matter of the investigation of the facts of the said accident and in the handling of the claims arising therefrom by intentionally giving to the Home false, misleading and conflicting statements as to the facts of said case and his connection therewith and by voluntarily entering a plea of guilty to a criminal charge of violation of the provisions of Section 480 of the Vehicle Code of the State of California in respect to the accident referred to [R. p. 22].

On the issues thus joined the Honorable District Court at the conclusion of the trial found that the defendant

George White has at all times cooperated with the defendant Home Indemnity Company of New York in the investigation of the accident herein described and in the defense of the hereinbefore described actions in the Superior Court of the State of California, in and for the County of San Diego, and that defendant George White has not breached any of the conditions of the policy issued by the defendant, Home Indemnity Company of New York, or the plaintiff, Standard Accident Insurance Company of Detroit, upon his part to be performed [R. p. 183, Finding 16].

The Court further found that defendant, George White, did not, in reporting the accident hereinbefore described to the Home Indemnity Company, make any false, conflicting, misleading or inconsistent statements of fact [R. p. 183, Finding 17].

The Court further found that the defendant Home Indemnity Company of New York was not mislead by any statement made to it by the defendant George White, or by any fact reported to it by said George White, and has not been in anywise prejudiced by any action or statement or omission of George White [R. p. 183, Finding 18].

In addition to finding that there has been no breach by White of the conditions of plaintiff's policy in requiring him to cooperate with it [R. p. 185], the Court went further and held that "having assumed said defense it was and is the duty of Home Indemnity Company of New York to attempt to establish the truth of the statement of George White, that he was asleep and did not know that

the accident occurred, so long as said George White maintains that said statement is true, and that said Home Indemnity Company is estopped in this action to assert the untruth of said statement or to assert that by reason of said statement he has failed to cooperate with it in the investigation and defense of the claims made by the plaintiffs in said state court actions." [R. p. 184, Finding 19.]

In accordance with the Findings and Conclusions of Law based thereon, declaratory judgment was accordingly entered, adjudging that defendant George White is the person insured under said policy of insurance and that defendant George White has not breached any of the terms of said policy upon his part to be performed, but has performed all of the terms and conditions of said policy; and that the insurance afforded by said policy is and at all times since the 20th day of July, 1946, has been valid and collectible; and adjudging further that it is the duty of the Home Indemnity Company to pay any judgment that may be rendered against George White in the actions growing out of said action and to pay the reasonable expenses incurred by the defendant George White in the defense thereof [R. p. 188].

### Specifications of Error.

Appellant respectfully submits that the Honorable District Court erred:

1. In finding that the defendant George White did not in reporting the accident make any false, misleading or inconsistent statement of facts [R. p. 183].
2. In finding that the defendant George White has at all times cooperated with the defendant Home Indemnity Company in the investigation of the accident, and in the defense of the action and has not breached any of the conditions of the policy upon his part to be performed [R. p. 183].
3. In finding that the defendant Home was not misled by any statements made to it by the defendant George White or by any fact reported to it by said George White and has not been in anywise prejudiced by any action or statement or omission of George White [R. p. 183].
4. In finding that it is the duty of the defendant Home to attempt to establish the truth of the statement of George White, that he was asleep and that the accident occurred while he was asleep and that said Home is estopped to assert the untruth of said statement or to assert by reason of said statement that he had failed to cooperate with it in the investigation of the defense of the claims made by the plaintiffs in said court actions [R. p. 184].

### Summary of Argument.

POINT I: The action being essentially equitable in character, the Appellate Court may on appeal review the sufficiency of the evidence to sustain the findings of fact upon which the judgment is based.

POINT II: Appellant argues that certain findings of the Honorable District Court upon which the conclusions of law and the judgment and decision are based, are against the clear weight of the testimony, particularly its finding that defendant White did cooperate with the defendant Home in the investigation of the accident and has not breached any of the conditions of the policy upon his part to be performed; in finding that defendant George White did not make any false, conflicting, misleading or inconsistent statements of fact; and in finding that defendant Home was not mislead by any statement made to it by defendant White and has not been in anywise prejudiced by any action, statement or omission of defendant George White, and that there has been no breach by him of the conditions of the Home policy requiring cooperation as a condition precedent to coverage.

POINT III: Appellant argues that it cannot be estopped to assert the untruth of White's statements and that it was an error at law for the District Court to find and hold that the appellant is estopped to question the truth of White's statements, particularly in view of the reservation of rights under which it undertook the defense, and because it is not the duty of the appellant Home to maintain a defense in which it cannot in equity and good conscience believe.

POINT IV: Appellant argues that prejudice must be presumed as a matter of law from a breach of the cooperation clause of the Home's policy under the weight of authority both in the United States and the California State Courts.

## ARGUMENT.

### POINT I.

#### This Court on Appeal May Review the Sufficiency of the Evidence to Sustain the Findings.

Counsel for appellant are aware that the Circuit Court of Appeals will not overturn the findings of a trial court when they are supported by substantial evidence, but it is respectfully submitted that an appeal from a judgment in declaratory relief, being in effect a decree in equity, involves a review of the facts as well as the law. Such was the holding in *MacGowan v. Barber*, 127 F. (2d) 458.

In the case of *State Farm Mut. Automobile Ins. Co. v. Bonacci*, 111 F. (2d) 412, the Court defined "Cooperation" in the sense used in automobile liability policy requiring insured actively to co-operate with insurer in defense of damage action, stating that it required that the insured should make a fair and frank disclosure of information reasonably demanded by the insurer, to determine whether there is a genuine defense.

In reversing adverse judgment in which the plaintiff had appealed, the Court said (at page 414):

"It is urged that we are bound in this case by the findings of the lower court on these issues. Rule 52(a) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, is as follows: 'In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its actions. Request

for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.'

"The rule plainly contemplates a review by the appellate court of the sufficiency of the evidence to sustain the findings. If this were not true, the provision that requests for findings are not necessary 'for the purpose of review' would be meaningless. If the findings are clearly erroneous, the appellate court should set them aside, always giving due regard to the fact that the trial court had the opportunity of observing the witnesses. In Simkins Federal Practice, 3d Ed., page 488, in commenting on the effect of Rule 52(a), it is said:

'The new practice, now incorporated in the Civil Procedure Rules, accords with the decisions on the scope of the review in modern Federal equity practice, and applies to all cases tried without a jury, whether legal or equitable in character, and whether the finding is of a fact concerning which the testimony was conflicting or of a fact inferred from uncontradicted testimony.'

'Under the new practice, where findings are made by the court without a jury, the appellate court is not limited to the mere question whether there is any substantial evidence to support them, but may set them aside if against the clear weight of the evidence, at

the same time giving full effect to the special qualification of the trial judge to pass on credibility.'

"The rule with reference to review of findings of fact in equity cases has often been announced by this court. *Johnson v. Umsted*, 8 Cir., 64 F. (2d) 316; *Koenig v. Oswald*, 8 Cir., 82 F. (2d) 85; *Lambert Lbr. Co. v. Jones Engineering & Constr. Co.*, 8 Cir., 47 F. (2d) 74; *Chicago, M., St. P. & P. R. Co. v. Flanders*, 8 Cir., 56 F. (2d) 114; *First National Bank v. Andresen*, 8 Cir., 57 F. (2d) 17; *United States v. Perry*, 8 Cir., 55 F. (2d) 819. In *Koenig v. Oswald*, *supra*, we reversed the findings of the lower court in a fraud case because they were deemed to be contrary to the weight of the evidence, even though they were sustained by the spoken word from the witness stand. While the findings of fact are presumptively correct, they are not conclusive on appeal, if against the clear weight of the evidence. In *Keller v. Potomac Electric Co.*, 261 U. S. 428, 43 S. Ct. 445, 449, 67 L. Ed. 731, the Supreme Court, in discussing procedure in an equity case, said: 'In that procedure, an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses.' "

## POINT II.

Certain of the Findings of Fact of the Honorable District Court Necessary to Sustain the Judgment Are Against the Clear Weight of the Evidence. (Specifications of Error I, II and III.)

On July 22, 1946, at San Diego, California, defendant George White made an oral statement to Lionel E. Clifton and Thomas P. Menzies, representatives of the Home Indemnity Company [R. p. 382] that he had not been in an accident, had not struck anyone and had not known anything about an accident. On the next day, July 23, 1946, White made a sworn statement that he was not involved in any traffic accident [Rep. Tr. pp. 65, 67 and 68], having made statements to the same effect to the San Diego police officers when he was apprehended after the accident on July 20, 1946 [R. pp. 71, 72], and to Officer Hake who interviewed him after he had been taken to the police station, and to whom he said, "I know nothing of any accident," [R. p. 294]. Mr. White having subsequently decided, on the advice of counsel employed to represent him in the criminal case, to enter a plea of guilty to the criminal charge of violation of Section 480 of the State Vehicle Code, the plea was accordingly entered on July 31, 1946 [R. p. 321].

The effect of this plea was of course to admit that he had knowingly struck and injured a person and did not stop to render aid. Such a plea of guilty would be subsequently admissible in evidence on the trial of the civil

actions growing out of the accident as a declaration or admission against interest that the facts were as admitted. Such is the holding in *Langsley v. Obert*, 129 Cal. App. 214.

According to Mr. White's own testimony, his decision to plead guilty was arrived at after he had concluded from pictures that he saw of his car [R. p. 459] and from what Mr. Holt told him about human blood and flesh being found on his car and the imprints of clothing, that it must have been his car that was involved in the accident and that he had fallen asleep and that the accident must have happened then [R. p. 460].

He admitted that he had said nothing to the representatives of the Home on the 22nd and 23rd of July about having fallen asleep, because he "was quite sure that it was unimportant and that I wasn't involved in any accident. That is the reason I didn't tell them." [R. pp. 458, 459.]

Thus, White failed to reveal to the defendant Home a fact most material to its investigation of the accident, in spite of the fact that he had been arrested for violation of Section 480 of the California Vehicle Code and jailed under those charges [R. p. 293]; and in addition had been informed of the damage to the borrowed car he was driving, and that the car he was driving was under suspicion of having been involved in an accident resulting in the death of two persons. One wonders what he would have considered important.

Witness, Henry T. Briggs, who was driving northerly on Highway No. 101 at the scene of the accident, at an estimated distance of 100 feet from the scene of the impact, heard a thud, a screech of brakes and saw the bodies of the victims rolling toward his car [R. pp. 233, 234, 235]. He also heard "the sound of breaking glass and something rolling down the highway, like the inside of a grill fell out." [R. p. 235.]

Witness, Lonnie Lee Hawkins, heard "an awful screeching of brakes and an awful impact" from inside the kitchen of the cafe in which he was working, at a point estimated at a distance of 30 feet from the point of impact [R. pp. 252, 255, 256] and observed that the bodies were thrown from 60 to 80 feet from the point of impact which he identified by the broken glass, "I heard the screeching of brakes just a moment before the impact, and also someone screamed." [R. p. 255.]

From the effects of the collision between the bodies of the victims and White's car, fabric brush marks and an imprint of fabric material into the paint were found, which was identified with the clothing of one of the decedents [R. pp. 308, 309]. The force of the collision was sufficient to tear a heavy gauge metal steel fender [R. p. 311], and in the opinion of witness, Ray H. Pinker, of the crime investigation laboratory of the Los Angeles Police Department, the back of the shirt and the back and elbow area of the right arm of decedent Lee came over on top of the fender and scraped along the left side of the hood [Tr. p. 311]; that the force of the collision was relatively great, "It is the greatest amount of damage that I have ever observed in 17½ years of examination of vehicles

which were suspected of and by physical evidence proved to have struck human beings." [R. p. 314].

It was the testimony of witness, Dr. Victor Parkin, that White could not pass through such an accident without being aware of it [R. p. 365], and that the "amount of the force, the noise created by the impact, and the transmission of the impulse to the individual would wake him up, unless he were, of course, very sound asleep or under the influence of alcohol." [R. p. 366.]

Officer Luther M. Hake, who was called to the scene of the accident, found numerous pieces of the headlight lens and numerous pieces of pot metal from the headlight lens, and the headlight grill, and from the "parking lamp" [R. p. 288], and found that it was approximately 50 feet from the point of impact to where the body of the woman was found, and approximately 57 feet to where the body of the man was found [R. p. 291].

Notwithstanding this state of the record, defendant White testified that he knew nothing about the accident and that it must have happened when he dozed off [R. p. 460]. The lawyer who represented him in the criminal case "found it very hard to believe" [R. p. 463], a doubt which was shared by the probation officer of San Diego County, assigned to investigate the case in connection with White's application for probation in the criminal proceedings [R. p. 374].

In the face of the foregoing the finding of the Honorable District Court that White did not in reporting the accident make any false, misleading or inconsistent statement of facts, must be taken to be against the clear weight of the evidence.

### POINT III.

In View of the Reservation of Rights the Court Erred in Finding and Deciding That It Was the Duty of the Home to Establish the Truth of White's Statement, and That It Was Estopped to Assert a Breach of the Co-operation Clause. (Specification of Error IV.)

The Honorable District Court found [R. p. 184] that:

“Having assumed said defense it was and is the duty of Home Indemnity Company of New York to attempt to establish the truth of the statement of George White, that he was asleep and did not know that the accident occurred, so long as said George White maintains that said statement is true, and that said Home Indemnity Company is estopped in this action to assert the untruth of said statement or to assert that by reason of said statement he has failed to cooperate with it in the investigation and defense of the claims made by the plaintiffs in said state court actions.”

It is respectfully submitted that this finding is clearly erroneous in view of the Agreement of Non-Waiver and Reservation of Rights, which was executed by defendant White prior to the undertaking of his defense by the Home (by counsel furnished by the Home) [R. pp. 171, 381], by the terms of which the defendant Home reserved its rights under the policy to any defense which it might have by reason of the terms and conditions thereof.

That an insurer which, before undertaking the defense of an action against an insured, expressly reserves its rights, does not waive defenses to the policy by so de-

fending the insured is fully substantiated by the authorities.

*U. S. F. & G. Co. v. Wyer*, 60 F. (2d) 856;

*Bowen v. Cote*, 69 F. (2d) 136;

*Eakle v. Hayes*, 185 Wash. 520 (55 P. (2d) 1072);

*Doolan v. U. S. F. & G. Co.*, 85 N. H. 531, 161 Atl. 39;

*State Farm Mutual Auto. Ins. Co. v. Phillips*, 210 Ind. 161 (2 N. E. (2d) 989).

The most serious objection to the finding is its effect of imposing upon counsel for the Home the duty of maintaining a defense of White based on his statement, regardless of the opinion of its credibility or bona fides, and to that extent it would appear to be open to the objection that it is contrary to the duty imposed upon counsel by Section 6068 of the Business & Professional Codes of California, Subsection (c), "Duties of an Attorney":

"It is the duty of an attorney \* \* \*

(c) to counsel or maintain such actions, proceedings or defense, only as appear to him legal or just, except as to a person charged with a public offense."

The oath of office prescribed by the Canons of Professional Ethics of the American Bar Association and the State of California imposes on counsel the duty:

"Not to counsel or maintain any suit or proceeding which shall appear to me to be unjust nor any defense except such as I believe to be honestly debatable under the law of the land;"

#### POINT IV.

##### Prejudice Must Be Presumed as a Matter of Law From the Breach of the Co-operation Clause of the Home Policy Under the Weight of Authority Both in the United States and the California State Courts.

Prior to the decision of the State Supreme Court in *Valladao v. Fireman's Fund Indemnity Co.* (1939), 13 Cal. (2d) 322, a number of Appellate Court cases adhered to the proposition that it was necessary for the insurer to show that it was substantially prejudiced by the assured's failure to co-operate as required by the policy.

*Panhans v. Associated Indemnity Corp.*, 8 Cal. App. (2d) 532;

*Norton v. Central Surety & Ins. Co.*, 9 Cal. App. (2d) 598;

*Jensen v. Eureka Casualty Co.*, 10 Cal. App. (2d) 706;

*Wormington v. Associated Indemnity Co.*, 13 Cal. App. (2d) 321.

But in *Valladao v. Fireman's Fund Indemnity Co.*, 13 Cal. (2d) 322, the Court although declining to determine definitely whether as an abstract proposition, an insurer must make a showing of prejudice resulting from an alleged breach of the co-operation clause, concluded from an examination of the record of the case under consideration that as a matter of law, prejudice would be presumed from the substantial and willful breach by the assured of the material co-operation clause in the policy, it appearing that the assured had repeatedly and willfully misrepresented to the insurer over a period of several

months that he was not driving the automobile insured at the time of the accident.

The Court also discussed the cases of *Hynding v. Home Accident Insurance Company*, 214 Cal. 743, and *Purefoy v. Pacific Auto. Indem. Exch.*, 5 Cal. (2d) 81 (which had been cited in some of the Appellate Court's decisions as authority for the ruling that it was necessary for the insurer to show that it had been prejudiced because of a breach of the co-operation clause), saying that in the *Hynding* case the question of the necessity of showing of prejudice was only briefly and incidentally discussed and was unnecessary to the disposition of the question in issue. Further, that in the *Purefoy* case the Court had likewise declined to determine the necessity of a showing of prejudice, because from the facts, prejudice sufficiently appears, the Court (in the *Valladao* case) saying:

“The decision in the *Purefoy* case then proceeds to point out that prejudice must be presumed from the failure of the assured therein to notify the insurer of the accident for a period of a year and three months (though it learned of the accident from the injured person three and one-half months thereafter) because such conduct precluded prompt investigation of the accident. It was also stated to be immaterial that the assured, after giving such belated notice offered to co-operate and that counsel for the injured person gave the insurer full opportunity to defend, of which it did avail itself. The insurer was said to be ‘entitled to rely on a substantial breach of so material a condition of its policy’.”

The conclusion reached in the *Valladao v. Fireman's Fund Indemnity Co.*, 13 Cal. (2d) 322, was followed in

the recent Appellate Court case of *Margellini v. Pacific Auto. Insurance Co.*, 33 Cal. App. (2d) 93, and *Wright v. Farmers Auto. Inter-Insurance Exchange*, 39 Cal. App. (2d) 70. From the facts in those cases, it was not necessary to determine whether an insurer must affirmatively show that prejudice resulted from the breach of the co-operation clause, but as in the *Valladao* case, it was said that (*Margellini* case) "as a matter of law prejudice must be presumed from the substantial and willful breach by the insured of the material co-operation clause of the policy."

The Court said at page 97:

"That a condition of a policy requiring the co-operation and assistance of assured in opposing a claim made, or an action brought, by an injured party is material to the risk and of the utmost practical importance; that without such cooperation and assistance the insurer is severely handicapped and may be precluded from making any defense; and that the insurer is entitled to know from its assured the true facts concerning the accident, in order that it may determine for itself whether to contest or attempt to settle the claim."

The Court said further at page 99:

"If it be assumed that any information which could have been furnished, in response to the appellant's request, would have disclosed or led to the discovery of the fact that no defense existed, that very fact would have shown the desirability of settling the claim."

It may be noted that an application by the respondent to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court in the *Margellini* case on July 24, 1939.

In *Miller v. Union Indemnity Co.*, 209 App. Div., 455, 204 N. Y. Supp., 730, the Court said:

“It is of no relevancy that the claim against the respondent (assured) was a valid one, and one which, in the ordinary course, if the conditions of the policy had been complied with, the appellant company (insurer) would ultimately have been obliged to pay. Such conditions would be robbed of nearly all practical value if, in applying them, the question of the validity of the professed claim must be investigated.”

In *Buffalo v. United States Fidelity & Guaranty Co.*, 84 F. (2d) 883, the Court said at page 884:

“The third defense alleges the facts constituting a breach of the co-operation clause in the language used in the answer in the *Wyer* case. By standing on his demurrer, plaintiff admits those facts to be true. Our decision in the *Wyer* case, even if not an adjudication against *Buffalo*, is controlling under the doctrine of stare decisis. Plaintiff argues that if such be the law, no recovery can ever be had on a liability policy unless the insured admits liability at the outset; that if insured’s version of the accident exculpates him from liability, and the jury believes that version, there is no judgment against him and hence no liability on the policy; if the jury does not accept his version, then the company is not liable because of the breach of the co-operation clause. Therefore, plaintiff concludes, an insured gets no

protection for the premium he pays. We do not construe the *Wyer* case as enabling a company to avoid liability simply because a jury does not accept insured's version of the accident, nor if the insured is honestly mistaken in his statements as to the accident or omits therefrom some relevant circumstances. *The company is entitled, however, to an honest statement by the insured of the pertinent circumstances surrounding the accident, as he remembers them.* Lacking that, the company is deprived of the opportunity to negotiate a settlement, or to defend upon the solid ground of fact. Nothing is more dangerous than a client who deliberately falsifies the facts. The allegation in the answer here is that *Buffalo* 'willfully misrepresented' the facts. And if *Buffalo* and *Jelley* were in the car when the collision occurred he did willfully falsify when he gave a long and detailed account of his presence at other places. There can be no suggestion here of faulty memory or mistaken version. If *Buffalo* was in the car when this terrible accident happened, he would remember it; if he was in the car his statement and his testimony that his car had been stolen and that he was not near the accident until after the collision is a deliberate premeditated piece of perjury, and he should not recover. If his statement and testimony twice repeated are true, then his policy does not cover the loss, as alleged in the fourth defense. The demurrer was properly overruled to the third and fourth defenses, each of these being a complete defense in itself, whether the other defenses pleaded are good in law is a matter of no consequence.

The judgment is affirmed."

### Conclusion.

It is respectfully submitted that the finding and decision of the Honorable District Court that there was no breach of the co-operation clause of Home's policy by defendant White, and that he did not make any false and misleading statements to the Home, and that the Home was not prejudiced by any action, statement or omission of defendant White, is against the clear weight of the evidence; that by his false and misleading statements the Home was not only delayed and prejudiced in its investigation of the case, but was deprived of the opportunity of determining at the time whether the case should be settled or contested; that the Home is particularly prejudiced in the defense of the civil actions growing out of the accident by reason of White's plea of guilty to the charge of violation of the provisions of Section 480 of the Vehicle Code of the State of California and the resulting admission that he had knowingly struck and injured the victims and did not stop to render aid, and by the extent to which White's testimony on the trial of the civil actions would be subject to impeachment by his various conflicting statements; and finally, it is respectfully urged that the Honorable District Court erred in finding and deciding that, notwithstanding the reservation of rights, it was the duty of the Home to attempt to establish the truth of White's various conflicting statements and that it was estopped to assert a breach by White of the co-operation clause of its policy.

It is respectfully submitted that upon the record presented and the points and authorities cited above that the judgment should be reversed.

Respectfully submitted,

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